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No. 84-295

In The

Supreme Court of the United States

October Term, 1984

UNITED MEXICAN STATES,

Petitioner,

v.

ERIN RAYNE OLSEN, A MINOR BY PATTY SHELDON, MATERNAL GRANDMOTHER AND GUARDIAN AD LITEM, AND URSULA BAINES SANCHEZ, BY AND THROUGH HER GUARDIANS AD LITEM, JOSEPH J. CERNIE AND SALLY Z. CERNIE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether pursuant to the Foreign Sovereign Immunities Act the Government of Mexico can be liable for negligent acts and tortious wrongful death occurring in the United States.

(2) Whether jurisdiction over Mexico exists pursuant to the Foreign Sovereign Immunities Act.

(3) Whether the flying of an airplane is a discretionary, policy planning-policy making activity as envisaged by the Foreign Sovereign Immunities Act, thus allowing Mexico immunity in tort.

(4) Whether Mexico is subject to the laws of the United States for conduct in the territory of the United States.

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UNITED MEXICAN STATES,

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ERIN RAYNE OLSEN, A MINOR BY PATTY SHELDON, MATERNAL GRANDMOTHER AND GUARDIAN AD LITEM, AND URSULA BAINES SANCHEZ, BY AND THROUGH HER GUARDIANS AD LITEM, JOSEPH J. CERNIE AND SALLY Z. CERNIE,

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OPINION BELOW

The Ninth Circuit Opinion is as yet unreported and is reprinted at A-1.

JURISDICTION

This Court's jurisdiction has been invoked by Petitioner, pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Statute involved is the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (Referred herein as FSIA.) This is set out in A-21.

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———o———

STATEMENT OF THE CASE

This is an action for negligent wrongful death against the Government of Mexico for the death of both parents of five year old Erin Rayne Olsen, and for the death of the mother of Ursula Baines Sanchez. The parents of the plaintiffs died in a plane crash in California on October 26, 1979.

On the fateful night in question near midnight and in heavy fog, a twin engine Beechcraft plane owned by the Mexican Government, operated by the Mexican Government and piloted by a Mexican Government employee, was attempting to land at the Tijuana airport. To do so, he intentionally entered United States air space and flew over the United States. The pilot had tried two previous landing approaches without success. En route to the airport, the pilot had requested instrument landing, which at Tijuana Airport required the airplane to enter United States air space so it can approach the runway from the west.

Following procedures established by a Letter of Agreement dating back to 1971 between aviation authorities of the United States and Mexico, Tijuana air control sought and received permission for the airplane to cross the border. Because its radar and instrument landing navigational systems were inoperative, Tijuana air control asked its counterpart in San Diego, California for assistance in guiding the plane to a landing.

In this manner the aircraft penetrated almost twelve (12) miles into United States air space. For almost thirty-six (36) minutes from first contact until crash, the pilot attempted three (3) landings without success. During that time the pilot was advised to abandon attempts and to proceed to El Centro or Mexicali. Unfortunately he did not follow that advice. On his final approach the pilot made a large circle over United States territory. He made his approach too low, failed to maintain proper altitude and struck a pole thirteen (13) feet high. The resulting calamitous crash killed all on board and occurred in California three quarters (¾) of a mile north of the United States-Mexican border and two and one (2½) miles from the beginning of the runway. The National Transportation Safety Board (United States) investigated the accident and concluded that the probable cause of the crash was pilot error.

The parents of both plaintiffs were United States citizens, and were being returned to California via Tijuana pursuant to the Prisoner Exchange Treaty of November 25, 1976 (28 U.S.T. 7400) by the Government of Mexico.

The plaintiffs, through their guardians ad litem who are all United States citizens and residents of California,

filed wrongful death-tort actions in the United States District Court, Southern District of California. The Olsen complaint alleges the negligence of defendant Republic of Mexico and its employees in San Diego County, California, which negligence resulted in the death of her parents.

The Republic of Mexico was served with a Summons and Complaint and has stipulated to proper service. Defendant Government of Mexico by special appearance moved to dismiss the complaint. Said motion was granted by the District Court on the grounds of lack of jurisdiction. On appeal the Nintth Circuit reversed holding that Mexico was not entitled to sovereign immunity, since the tort occurred within the United States and that Mexico was subject to the jurisdiction of the United States District Court.

REASONS FOR DENYING THE WRIT

Introduction

The Ninth Circuit's decision interpreting the Foreign Sovereign Immunities Act, and in particular Section 1605(a)(5), is not in conflict with the decisions of any other Court. The Ninth Circuit's decision is not in conflict with this Court's decision interpreting discretionary function under the Federal Tort Claims Act.

The particular set of circumstances which brought about this tort is unique to the parties themselves, and because of the unusual fact situation is unlikely to have any wide-ranging consequences other than to these parties.

The holding of the Ninth Circuit breaks no new ground and is consistent with other Circuits in their interpretation of the Foreign Sovereign Immunities Act and the "discretionary function" as set forth in the FSIA and the Federal Tort Claims Act.

Finally, the Foreign Sovereign Immunities Act has been part of our Federal Statutes since 1977. There have been numerous court decisions interpreting that Act. The decisions in *Letelier v. Republic of Chile,* 481 F.Supp. 665 (1980), *De Sanchez v. Banco Central de Nicaragua,* 515 F.Supp. 900 (1981), *Matter of Sedco, Inc.,* 543 F.Supp. 567 (1982), *Harris v. VAO Intourist, Moscow,* 481 F.Supp. 1056 (1979), *Skeen v. Federative Republic of Brazil,* 566 F.Supp. 1414 (1983), *Upton v. Empire of Iran,* 459 F. Supp. 264 (1978), have all interpreted the torts section of the Foreign Sovereign Immunities Act. *Letelier* and *De Sanchez* have both clearly held that sovereign immunity did not exist in regard to those particular cases, and each of them held the defendant foreign government liable to the plaintiff in tort. Thus, the Government of Mexico was placed on notice that in tort cases as set forth in the FSIA, defendants could be liable for tortious conduct. Thus, there is jurisdiction, notice, and no violation of due process.

The Court below found the minimum contacts required to satisfy due process since there was and is a purposeful availing of the benefit and protections offered by the forum state through the past and repeated use of American air space and American assistance in making landing approaches over American territory. The Letter of Agreement in existence since 1971 between the Government of Mexico and the United States providing for entry

into American air space over American territory, and assistance in landing, provided both notice to the defendant and provided benefits and protections of the forum's laws. The plaintiffs' claim arises precisely out of these activities and thus the personal jurisdiction over the defendant is present.

I.

The Government Of Mexico Is Subject To Jurisdiction For Torts Under The Foreign Sovereign Immunities Act.

The decision of the Ninth Circuit is in harmony with other Federal Court decisions interpreting the Foreign Sovereign Immunities Act. Those cases which have dealt with the torts section of the FSIA have all held that foreign governments can be liable for torts even when these torts are carried out in the course of "government-public activities."

We start with the language of the FSIA.

> "1605. General exceptions to the jurisdictional immunity of a foreign state.
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the states in any case—
>
> (5) not otherwise encompassed in paragraph (2) above (commercial activity) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while act-

ing within the scope of his office or employment; except this paragraph shall not apply to—

(A) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or

(B) Any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."

Thus, we see that the plain wording of the statute eliminates immunity when the suit is for: (1) money damages, (2) personal injury or death, (3) occurring in the United States, and (4) caused by the tortious act or omission of a foreign state while acting within the scope of his office or employment. Mexico argues that when Congress spoke it did not say what it meant to say and that immunity would be eliminated only for commercial torts. However, Mexico has closed its eyes to cases which have interpreted the FSIA and conveniently forgets portions of the legislative history that are not helpful to its position.

In *Letelier v. Republic of Chile,* 488 F.Supp. 665 (1980), plaintiffs sued the Government of Chile for the assassination of the father and husband of plaintiffs. These acts were alleged to be governmental activities of the Government of Chile. The Court held that the FSIA § 1605(a)(5) *did* apply to such governmental activities. It specifically rejected the analysis that Mexico is urging in this case, and stated:

"Indeed the other provisions of the act mandate that the Court not do so (make such distinctions between governmental-public and nongovernmental activities) for it is made clear that the act and the prin-

ciples it sets forth in its specific provisions are henceforth to govern *all* claims of sovereign immunity by foreign states." (Emphasis added.)

The *Letelier* Court further went on to state:

> "Further, any notion that Congress wished the Courts to go outside the scheme promulgated by legislative action to determine the extent to which the defense of sovereign immunity could be invoked is foreclosed by the committee reports that not only state that: 'this bill sets forth the *sole and exclusive standard* to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State Courts in the United States . . .'" (Emphasis added.)

The soundness of the *Letelier* Court's findings was echoed and reinforced in *De Sanchez v. Banco Central de Nicaragua*, 515 F.Supp. 900 (1981). In that case plaintiff sued the Government Bank of Nicaragua for the tort of conversion. The Court found that the defendant's conduct was *governmental-public* and *not commercial.* It reviewed the legislative history and stated:

> "Although according to its legislative history the Immunities Act codified the 'restrictive' approach, House Report 6605, that same history makes clear any 'public act' of a foreign state for which it enjoys immunity is an act not within the exceptions in Sections 1605-1607.
>
> Thus, the FSIA goes farther within the governmental/commercial dichotomy of the restrictive approach. Although claims arising from commercial activities are actionable under 1605(a)(2), so are certain claims of expropriation under 1605(a)(3) and *certain torts under 1605(a)(5). Even if the conduct giving rise to these claims is 'governmental,' Congress has concluded that it should be actionable because of its grievous nature and its connection to the United States.*" (Emphasis added.)

Even in the case of *Matter of Sedco*, 543 F.Supp. 561 (1982), a suit against Pemex, the Mexican Government-owned oil company, in which the Government of Mexico was the defendant, the Court acknowledged that governmental (public) non-commercial torts were covered by § 1605(a)(5). They made no distinction between governmental (public) and commercial or private acts.

The legislative history of the FSIA is quite clear:

> "Noncommerciol torts—Section 1605 is directed primarily at the problem of traffic accidents but is passed in general terms as applying to all tort actions for money damages, not otherwise encompassed by 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injuries or deaths or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its official or employees acting within the scope of their authority . . .
>
> As used in Section 1605(a)(5) the phrase 'tortious act or omission' is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (a) and (b) of 1605 (a)(5) correspond to many of the claims in respect to which the United States Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h) . . . The purpose of Section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law."
>
> House Report No. 94-1487, Page 21.

Note that the language of the legislative history "caused by the tortious act or omission of a foreign state or its official or employees acting within the scope of their authority," is almost identical to the language in the statute itself: "caused by the tortious act or omission of

that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;" Thus, this Court can see that the legislative history and the statute clearly anticipate public acts to be covered by the FSIA 1605(a)(5).

The Court below in its decision disposed of Mexico's public/private distinction by pointing out that § 1605(a)(5)(A) which does exempt from the reach of § 1605(a)(5) those torts committed in a foreign state's discretionary capacity. Discretionary functions include those acts or decisions made at the policy-making or planning level of government. Those torts involving acts or omissions of a fundamentally governmental nature are not actionable. Thus, despite § 1605(a)(5)(A), a foreign state remains largely immunized from torts committed in its governmental capacity. Mexico's position that governmental acts are automatically read out of § 1605(a)(5) would render § 1605(a)(5)(A) superfluous. Its argument is therefore untenable.

II.

Mexico's Tortious Conduct Occurred In The United States, The Injury Occurred In The United States, § 1605(a) (5) Applies And Mexico Is Not Immune.

Let us be clear about the facts as set forth in the record below, and as found by the Ninth Circuit in their decision. The crash occurred within the United States, three quarters (¾) of a mile north of the Mexican border and two and one half (2½) miles from the Mexican runway. The deaths of the parents of the plaintiffs occurred in the United States. The Mexican pilot had entered United States air space to the depth of almost twelve (12)

miles. He was being assisted by United States air controllers. The pilot spent approximately thirty-six (36) minutes flying between Mexico and the United States, and over United States territory attempting to land. The pilot failed to maintain the proper altitude while flying over United States territory and while in United States air space and consequently crashed to the ground in the United States. The cause of the crash within the United States was found by the NTSB to be pilot error. An attempt by the Government of Mexico to characterize the events as not occurring in the United States is a distortion of the record. If there are factual disputes between the parties, they are to be resolved by the trial court.

Returning to the FSIA, § 1605(a)(5), the plain language of the statute makes it clear that a foreign state shall not be immune from jurisdiction of courts of the United States in any case in which 1) money damages are sought against a foreign state 2) for personal injury or death, or damage to or loss of property 3) occurring in the United States and 4) caused by the tortious act or omission of that foreign state. Thus we see that the statute is satisfied when injury of tortious conduct occur within the United States. Mexico is trying to escape liability by contending that if some tortious conduct occurred in Mexico that would allow it to slip out from under the jurisdiction of the Courts of the United States. Therefore, its argument practically concedes that it committed negligent acts in Mexican territory such as the decision to make a second approach after missing the first one, acts or omissions of Tijuana air controllers, the training of the pilot, the maintenance of the plane. Mexico would be happy to admit any other negligent acts on

its own territory if it could only dodge liability here. In fact, that is precisely what the Court below was concerned with.

> "By requiring every aspect of the tortious conduct to occur in the United States a rule such as in *Sedco* would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA which is to 'serve the interest of justice and protect the rights of both foreign states and litigants in United States courts.' "

Respondents might add that such a rule would also encourage perjury or the manufacture of evidence of negligence abroad so as to defeat legitimate tort claims against a foreign government.

This case is distinguishable from *Matter of Sedco,* 543 F.Supp. 561 (1982) where there was an explosion of an oil well in Mexico causing damage to American shores, in that in *Sedco* ***none*** of the alleged acts or omissions but only the resultant injury occurred in the United States. Thus, the Court below distinguished *Sedco's* facts from the instant case.

On this one issue the Court below held as follows:

> "Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under Section 1605(a)(5). In this case, appellants allege conduct constituting a single tort—the negligent piloting of the aircraft—which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the noncommercial torts exception as expressed in Section 1605(a)(5) and its legislative history."

Finally, this Court should note that Section 1605(a)(5) only requires that the *injury* complained of occur in the United States. (It does not require that the tortious conduct must also take place in the United States.) Thus, the straight forward wording of the statute only requires injury to occur in the United States to provide jurisdiction.

III.

The Conduct Of Piloting A Plane Occurs At The Operational Level And Is Not A Discretionary Function.

The tort that caused the death of the plaintiffs' parents was the failure to use reasonable care in the operation of the airplane on a landing approach. It cannot be seriously contended by the Republic of Mexico that the pilot had the "discretion" to pilot the plane at an altitude or in a manner that would bring it in contact with the ground causing it to crash. This is not the kind of policy-making or policyplanning discretion that was envisioned by the FSIA or the Federal Tort Claims Act to which the FSIA refers or rules upon in *Dalehite v. U.S.*, 346 U.S. 15 and the cases that followed.

This Court recently reaffirmed *Dalehite* in *U.S. v. S.A. Empresa de Viacao Area Rio Grandense (Varig Airlines)*, 52 U.S.L.W. 4833 (1984): "Where there is room for policy judgment and decision there is discretion." *Dalehite, supra.* Does Mexico contend that the decision to fly ten (10) feet from the ground is a policy judgment decision excusing it from liability? In the instant case, the Court below examined the facts and concluded consistent with *Dalehite, supra,* and *Varig, supra,* that the pilot was not engaged in a discretionary function.

Several Federal cases interpreting the FTCA are close to the instant case. In *Sullivan v. The United States,* 129 F.Supp. 713, the plaintiff was injured when a car driven by an FBI agent acting within the course and scope of his employment collided with the plaintiff's car. The Court found that the act was not discretionary and further st. ed in reflecting upon the tort claims act and in quoting this court:

> "The Supreme Court stated, 346 U.S. at page 28, 73 S.Ct. at page 964, that uppermost in the mind of Congress were the ordinary common law torts, such as 'negligence in the operation of vehicles' . . . the Supreme Court said 'the draftsman did not intend to relieve the government from liability for such common law torts as an automobile collision caused by the negligence of an employee' of the administering agency."

A similar case where there was not a discretionary function found at the operational level was *Ingham v. Eastern Airlines and United States of America,* 373 F.2d 227 where the government was found liable for the negligence of air controllers who negligently guided a plane into a crash. The Court there stated:

> "When the government decided to establish and operate an air traffic control system, that policy decision was the exercise of 'discretion' at the planning level and could not serve as the basis of liability. (Citing *Dalehite v. U.S.*) But once having made that decision, the government's employees were required thereafter to act in a reasonable manner. A failure to do so rendered the government liable for the omission or commission. Thus it has been decided that the government can be held liable for the negligence of its air traffic controllers. 'Discretion' was exer-

cised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

Thus, the same can be said of the Government of Mexico. It had the discretion in regard to whether it would enter a Prisoner of Exchange Treaty with the United States and which prisoners would be exchanged. However, the act or omission in question involved the transportation of prisoners, an act remote from a policy decision to transfer them. Pilot and air controllers may have had discretion in carrying out their assigned tasks, but they acted on the operational level and not in the centers of policy judgment. The conduct of Mexican personnel which may have led to the crash occurred at the operation level and was not discretionary. This was the clear holding of the Court below.

As the Court below further stated, this dispute does not raise questions of policy decisions of Mexico, only issues of historical fact and tort liability. Therefore, the Trial Court can readily evaluate the alleged tortious acts as it is well suited to the task of determining facts and applying the relevant law.

IV.

Jurisdiction Over The Tort Feasor Comports With Due Process.

Congress passed the FSIA in 1976 to be effective January 1, 1977. Thus, on our statute books was clear notice that governments would not be immune for torts falling under § 1605(a) (5).

Further, the Government of Mexico and the Government of the United States had implemented in 1971 the

Letter of Agreement governing the use of American air space when Mexican planes needed to land in Tijuana under adverse weather conditions. Contained in that Letter is the scheme of cooperation and assistance. The Government of Mexico is availing itself of the benefits and protections of United States air space and its laws. This lawsuit arises precisely from that activity. Within California there is a legislative framework governing the use of air space. Ths is entitled the California State Aeronautics Act (Public Utilities Code, Sections 21001-21694.) The Act governs operation of aircraft, airports, zoning, cooperation with Federal Agencies, lawful and unlawful flight and tort liability. Section 21401 states:

> "Sovereignty in the space above the land and waters of this state rest in the state, except where granted to and assumed by the United States pursuant to a Constitutional grant from the people of the state.
>
> The operation of aircraft in such space is a privilege subject to the laws of this state."

Thus, while flying over California air space, the defendants were subject to and availed themselves of the benefits and protections of California and the United States government. When it availed itself of those benefits and protections, it subjected itself to jurisdiction. When its activities are combined with the Letter of Agreement which goes as far back as at least 1971, this Court can see that the element of foreseeability is indeed present. There was a purposeful availing of the laws and protections of the forum, and the Government of Mexico cannot claim surprise or lack of notice or due process.

———o———

CONCLUSION

The opinion of the Court below is not in conflict with any other Circuit opinions regarding the FSIA or "discretionary functions" nor is it in conflict with this Court's opinions. Further, the unique set of facts which give rise to this tort case is peculiar to the parties and will turn upon its particular unique fact situation. Finally, issues of in personum jurisdiction were decided upon long-established lines. There have been no new departures in law. Thus a Writ for Certiorari should not be granted.

Respectfully submitted,

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Amended Opinion of the United States Court of Appeals
for the Ninth Circuit, dated July 16, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5626

USDC No. CV 82-0413-JLI

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON,
Maternal Grandmother and Guardian ad Litem,
Plaintiffs-Appellants,

vs.

GOVERNMENT OF MEXICO,
Defendant-Appellee.

No. 83-5629

USDC No. CV-81-1067-JLI

URSULA BAINES SANCHEZ, by and through her
Guardians ad Litem JOSEPH J. CERNIE and
SALLY Z. CERNIE,
Plaintiffs-Appellants,

vs.

THE REPUBLIC OF MEXICO, a Foreign Government,
Defendant-Appellee.

AMENDED OPINION

Argued and Submitted: October 6, 1983

Appeal from the United States District Court
for the Southern District of California
Hon. J. Lawrence Irving, District Judge Presiding

Before:

FLETCHER and NELSON, *Circuit Judges*,
and HARDY,* *District Judge*.

NELSON, *Circuit Judge:*

Erin Olsen and Ursula Sanchez appeal from the dismissal of their wrongful death claims for lack of personal jurisdiction. The district court held that general contacts between the defendant and the forum state provided no basis for jurisdiction. Additionally, the court concluded that personal jurisdiction based on defendant's forum-related activities would be unreasonable and thus violative of due process requirements.

On appeal, the Government of Mexico ("Mexico") also challenges subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891-98, 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611 (1980) [hereinafter cited as the FSIA].

We find that both subject matter jurisdiction and personal jurisdiction exist and therefore reverse.

FACTS

Appellants Olsen and Sanchez, United States citizens domiciled in California, are minor children claiming the wrongful death of their parents. As prisoners of the Mexican government, the parents of appellants were to be transferred to authorities for incarceration in the United States pursuant to the Prisoner Exchange Treaty between the United States and Mexico.

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*Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

On the night of October 27, 1979, a twin-propeller plane owned and operated by the Mexican government carrying guards, pilots and appellants' parents departed Monterrey, Mexico for Tijuana, where the transfer was to take place. En route, the pilots, employees of the Mexican Department of Justice, learned of thick fog and diminishing visibility at their destination. They requested an instrument landing which, at Tijuana Airport, requires the airplane to enter United States airspace so it can approach the runway from the west. Following procedures established by a Letter of Agreement between aviation authorities of the United States and Mexico, Tijuana air control sought and received permission for the airplane to cross the border. In addition to providing access to United States airspace during hazardous weather conditions, the Letter also allows for coordinated navigational assistance.

Because its radar and instrument landing navigational systems were inoperative, Tijuana air control asked its counterpart in San Diego to radio direction headings, altitude and location data necessary for an instrument landing to the aircraft. Unfortunately, neither the San Diego air controllers nor the pilots were bilingual. Instead, the San Diego air controllers relayed the information via the telephone "hotline" to Tijuana air control which radioed a translation to the pilots.

In this manner, the aircraft penetrated almost 12 miles into United States airspace, made a wide turn and began to descend toward Tijuana Airport. Having strayed one mile off the proper course, the pilot abandoned the approach at the border and re-entered Mexican airspace.

San Diego air control advised the pilot to proceed to other airports where visual landings would be possible. The pilot declined and decided to attempt another instrument landing. With the continued use of navigational data from San Diego air control, the airplane re-entered United States airspace. The pilots aligned the aircraft with the proper compass heading and descended on course, but failed to maintain the proper altitude. After striking a telephone pole, the airplane crashed three-quarters of a mile inside the United States, killing all on board. The crash site was two and one-half miles from the beginning of the runway.

DISCUSSION

The FSIA sets forth criteria which must be satisfied to establish both statutory subject matter jurisdiction and personal jurisdiction. The FSIA confers subject matter jurisdiction upon district courts in nonjury civil actions where the foreign state is not entitled to immunity as defined by the FSIA's substantive provisions, 28 U.S.C. § 1330(a) (1982). Personal jurisdiction is established whenever subject matter jurisdiction exists and service of process has been made in accord with section 1608 of the FSIA. 28 U.S.C. § 1330(b) (1982). Thus, both forms of jurisdiction turn on whether the foreign state is entitled to sovereign immunity. If the dispute does not come within one of the exceptions to sovereign immunity explicitly provided by sections 1605-1607, the district court lacks both subject matter jurisdiction and personal jurisdiction.

I. Subject Matter Jurisdiction

As section 1330(a) indicates, sovereign immunity is not merely a defense under the FSIA. Its absence is a

jurisdictional requirement. *See Verlinden, B.V. v. Central Bank of Nigeria,* 103 S.Ct. 1962, 1971 n.20 (1983) *("Verlinden").* We begin our inquiry, therefore, by considering whether Mexico is entitled to immunity.

The FSIA grants blanket immunity to foreign states, 28 U.S.C. § 1604, and then carves out specific exceptions to immunity in sections 1605 to 1607. Appellants allege that their wrongful death claims come within the so-called "noncommercial torts" exceptions, section 1605(a)(5), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case.
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> (5) not otherwise encompassed in paragraph (2) above, [the commercial activity exception] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;

28 U.S.C. § 1605(a)(5) (1982).

Mexico argues that section 1605(a)(5) does not apply and it is therefore immune from suit. First, Mexico contends that Congress, in enacting the FSIA, adopted the restrictive theory of sovereign immunity and that Mexico's conduct was of the public nature held to be immune under that theory. Second, Mexico asserts that the 1605 (a)(5) exception to immunity requires all the acts or omissions constituting the tort to occur within the United

States. Finally, Mexico characterizes its activities which led to the crash as discretionary functions, thus falling within the exception to jurisdiction set forth in section 1605(a)(5)(A). We consider these arguments in turn.

A. The FSIA and the Restrictive Theory of Sovereign Immunity.

It is clear that the FSIA, for the most part, codifies the restrictive principle of sovereign immunity. *See Verlinden,* 103 S.Ct. at 1968. Under this principle, the immunity of a foreign state is "restricted" to suits involving that state's public acts (jure imperii) and does not extend to suits based on its private or commercial acts (jure gestionis). *McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 587 n.6 (9th Cir. 1983).

Mexico argues that this public/private distinction applies not only to the FSIA generally, but specifically to section 1605(a)(5), the noncommercial torts exception to immunity. According to Mexico's interpretation, foreign states would be immune from jurisdiction for those torts which otherwise come within the bounds of section 1605 (a)(5) but which are public in nature.

Section 1605(a)(5) cannot be read, however, other than in conjunction with section 1605(a)(5)(A), which exempts from the reach of section 1506(a)(5) those torts committed in a foreign state's discretionary capacity. 28 U.S.C. §1605(a)(5)(A) (1982). Discretionary functions, as discussed below, include those acts or decisions made at the policy-making or planning level of government. Those torts involving acts or omissions of a fundamentally governmental nature are not actionable. Thus, despite section 1605(a)(5), a foreign state remains large-

ly immunized from torts committed in its governmental capacity. Mexico's position, that governmental acts are automatically read out of section 1605(a)(5), would render section 1605(a)(5)(A) superfluous. Its argument is therefore untenable.

B. The Location of the Tortious Conduct.

Section 1605(a)(5) requires the injury complained of to occur in the United States.[1] The provision does not indicate that the conduct causing the tort must also take place in the United States. Ordinarily, this would end our inquiry and there would be no need to consider the location of the tortious conduct. Where, as in the instant case, the injuries occurred in the United States, and all other requirements of section 1605(a)(5) are met, the foreign state would not be immune. However, the legislative history to section 1605(a)(5) indicates that "the tortious act or omission must occur within the jurisdiction of the United States. . . ." *House Report* at 21.

A careful reading of the record in this case suggests that many potentially tortious acts and omissions occurring both in Mexico and the United States caused the crash. Pilot error, the absence of operational radar and navigational aids at Tijuana airport, defective aircraft instruments, the decision to forego a visual landing at another airport, inaccurate data from San Diego air con-

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1 Section 1605(a)(5) specifies that foreign states are not immune from jurisdiction in any case in which money damages are sought "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . ." 28 U.S.C. § 1605(a)(5)(1982).

trol, and other factors may have contributed causally to the accident.

Mexico, relying on *Matter of SEDCO,* 543 F. Supp. 561, 567 (S.D. Tex. 1982) *(SEDCO),* contends that section 1605(a)(5) must be construed to require all of the tortious conduct to occur in the United States before a foreign state will be denied immunity. In *SEDCO,* an exploratory off-shore well operated by Pemex, the Mexican national oil company, exploded in Mexican waters. The resulting oil slick washed up on the shores of Texas. Citizens there sued Pemex and other parties under section 1605(a)(5). Citing that section's legislative history requiring the tortious act or omission to occur within the United States, the court held that for the noncommercial tort exception to apply, "the tort, in whole, must occur in the United States." *SEDCO,* 543 F. Supp. at 567.[2] Thus, Mexico argues, because some allegedly tortious acts or omissions took place outside the United States—such as the maintenance of the aircraft and the inoperative radar at Tijuana airport—Mexico should be immune.

The instant case is distinguishable from *SEDCO* in one crucial respect. In *SEDCO, none* of the alleged acts or omissions, only the resultant injury, occurred in the United States.[3] By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in

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2 *See also Perez v. The Bahamas,* 652 F.2d 186, 188-89 (D.C. Cir.), *cert. denied,* 454 U.S. 865 (1981). *Perez* is distinguishable from this case because both the tortious conduct and injury occurred outside the United States.

3 *See also Persinger v. Islamic Republic of Iran,* 729 F. 2d 835 (D.C. Cir. 1984) (distinguishable on same grounds).

SEDCO would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA, which is to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states. Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5). In this case, appellants allege conduct constituting a single tort—the negligent piloting of the aircraft—which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the noncommercial torts exception as expressed in section 1605(a)(5) and its legislative history.

C. The Discretionary Function Exception.

Section 1605(a)(5)(A) provides an exception to noncommercial tort jurisdiction for claims based upon a state's discretionary function.[4] Mexico seeks to bring the airplane crash within this exception by contending that the conduct which led to the crash was discretionary.

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4 Section 1605(a)(5) does not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether discretion be abused.

28 U.S.C. § 1605(a)(5)(A)(1982).

The FSIA provides considerable guidance as to which acts or decisions constitute discretionary functions. Not only does the language of the FSIA discretionary function exception replicate that of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in explaining section 1605(a)(5)(A), directs us to the FTCA. *House Report* at 21. To determine the scope of the discretionary function exception of the FSIA, we therefore turn to the interpretation given the similar FTCA provision.[5]

The seminal case defining the scope of the discretionary function exception within the context of the FTCA, *Dalehite v. United States,* 346 U.S. 15 (1953), held "discretion" to mean:

> "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."

Id. at 35-6. In so defining discretion, the Court adhered to the legislative purpose behind the exception: to allow government executives to make policy decisions in an atmosphere free of concern over possible litigation. *Id.* at 32.

Over the years, the definition of discretion has been refined and qualified somewhat. *See Driscoll v. United*

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5 The Federal Tort Claims Act does not apply to:

> (a) Any claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a)(1982).

States, 525 F.2d 136, 138 (9th Cir. 1975). This circuit employs a test which distinguishes between the "planning level" of governmental activity and those acts designed to carry out policy, the "operational level." *Thompson v. United States,* 592 F.2d 1104, 1111 (9th Cir. 1979). Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function exemption provides no protection from liability even though such decisions or acts may involve elements of discretion. *Lindgren v. United States,* 665 F.2d 978, 980 (9th Cir. 1982); *see also Thompson,* 592 F.2d at 1111; *Driscoll,* 525 F.2d at 138. In addition to examining the level at which the conduct occurred, we also consider two other factors which are particularly important when determining the immunity of foreign states: the ability of United States courts to evaluate the act or omission of the state, and the potential impairing effect such an evaluation would have on the effective administration of the state's government. *Lindgren,* 665 F.2d at 980; *Driscoll,* 525 F.2d at 138.

We conclude that of those alleged acts or omissions on the part of Mexico which contributed to the accident, none was discretionary. First, while Mexico's decision to enter into the Prisoner Exchange Treaty with the United States or to transfer these particular prisoners to United States custody might well be deemed discretionary, those decisions are not implicated in the instant action. Rather, appellants allege that Mexico negligently maintained, directed and piloted the aircraft. Such conduct represents measures taken to implement the broader policy or plan to exchange prisoners. The acts or omissions in question involved the transportation of prisoners, an act remote from

the policy decision to transfer them. While the pilot and air controllers had considerable discretion in carrying out their assigned tasks, *see Lindgren*, 665 F.2d at 980; *Thompson*, 592 F.2d at 1111; *Driscoll*, 525 F.2d at 138, it is clear that they acted on the operational level, far from the centers of policy judgment. *See also Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir. 1967) (air controller's failure to comply with regulations occurred at operational level); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 396 (9th Cir. 1964); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62, 78 (D.C. Cir. 1955) (control tower operators act at operational level).

Second, this dispute does not raise questions of policy decisions of Mexico, only issues of historical fact and tort liability. Therefore, the trial court can readily evaluate the allegedly tortious acts as it is well suited to the task of determining facts and applying the relevant law.

Third, we see nothing which suggests that denying immunity will impair the effectiveness of Mexico's penal or aviation authorities. A trial on the merits will call for the testimony of individuals involved in the accident, primarily Mexican air traffic control personnel. There seems little doubt that the air traffic authorities and other relevant governmental entities can function without diminished efficacy while their employees testify in discovery or court proceedings.

In conclusion, the claims asserted by appellants fall within the exceptions to immunity for noncommercial torts as provided by section 1605 (a) (5) of the FSIA. Additionally, the conduct of Mexican personnel which may have led to the crash occurred at the operational level and was

not discretionary. Thus, Mexico is not immune under the FSIA and subject matter jurisdiction exists.

II. Personal Jurisdiction

Personal jurisdiction over a foreign state exists in any case where the foreign state is not entitled to immunity under the FSIA and service has been made in accordance with the statute's requirements. 28 U.S.C. §1330(b) (1982). There has been no assertion that service did not comply with the statute, but we must still consider whether the exercise of personal jurisdiction exceeds the constitutional limits imposed by the due process clause. Because California's long-arm statute extends the state's jurisdiction to the very limits of due process under the federal constitution, we examine personal jurisdiction in light of due process as defined by the United States Supreme Court. *Thomas P. Gonzalez Corp. v. Consejo National de Produccion de Costa Rica*, 614 F.2d 1247, 1250 (9th Cir. 1980) (quoting *Thelkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974), *cert. denied*, 419 U.S. 1023 (1974). As stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), due process requirements are met only if the defendant has sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

In our circuit, the defendant's contacts with the forum state are analyzed in two ways. If the non-resident defendant's activities within a state are "substantial" or "continuous and systematic," there is a sufficient relationship between the defendant and forum to support jurisdiction even if the cause of action is unrelated to the

defendant's forum-related activities: *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-48 (1952); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). If, however, the defendant's activities are not so pervasive as to subject the defendant to general jurisdiction, personal jurisdiction turns on the nature and quality of the defendant's contacts relating specifically to the cause of action. *Data Disc*, 557 F.2d at 1287. To find limited jurisdiction based on the defendant's forum-related activities, we require (1) the non-resident defendant to perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim to arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction to be reasonable. *Raffaele v. Campagnie Generale Maritime*, 707 F.2d 395, 397 (9th Cir. 1983); *Data Disc*, 557 F.2d at 1287. Because we find sufficient contacts to justify limited jurisdiction, it is unnecessary to consider whether general jurisdiction exists.

The first two requirements of the *Data Disc* minimum contacts analysis are easily satisfied. In order to land during hazardous weather conditions, the pilot of the aircraft sought and received permission to enter United States airspace pursuant to procedures negotiated for precisely those circumstances. While receiving navigational assistance from San Diego air control, the pilot twice intentionally entered United States airspace. In so doing, Mexico purposefully availed itself of the benefits of operating its aircraft over California. In addition, the claims of appellants arise from the plane's flight and crash in California.

Jurisdiction is reasonable where "under the totality of the circumstances the defendant could reasonably an-

ticipate being called upon to present a defense in a distant forum." *Taubler v. Giraud*, 655 F.2d 991, 993 (9th Cir. 1981); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). While there is no mechanical or quantitative test for determining the reasonableness of jurisdiction, at least seven factors are relevant. *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981) [hereinafter cited as *I.N.A.*]. To determine reasonableness, we consider the relative significance of each factor and balance them all. *Id.* at 1273. We apply these factors below and conclude that personal jurisdiction over Mexico is reasonable.

A. Extent of Purposeful Interjection.

The extent of Mexico's purposeful interjection into California was substantial. The pilots intentionally entered United States airspace with the approval of Tijuana air control in order to make an instrument landing. While the decision to enter was made under exigent circumstances, the flight over California was neither accidental nor fortuitous. The pilot and Tijuana air control followed detailed procedures agreed to by Mexico and set forth in the Letter of Agreement in anticipation of weather conditions necessitating instrument landings. Furthermore, after the second missed approach, the pilot rejected a suggestion to land the aircraft at alternate airports in favor of another instrument approach over San Diego.

B. Burden of Defending.

While a primary concern in assessing the reasonableness of jurisdiction is the burden on the defendant, it is not dispositive and is to be considered in light of other

relevant factors. *World-Wide Volkswagen*, 444 U.S. at 292; *Raffaele*, 707 F.2d at 398.

Undoubtedly, litigating abroad imposes significant inconveniences upon the party appearing in a foreign country. Transportation of witnesses, attorneys and physical evidence presents problems of logistics and expense, as does the need to translate testimony and documents. However, these inconveniences are minimized in the instant case. The physical evidence, including the wreckage and crash site, is located in San Diego. Other evidence, such as National Transportation Safety Board (NTSB) reports and the testimony of San Diego air traffic controllers and NTSB investigators, is in English and is available in San Diego as well. Additionally, advances in international transportation and communication facilities have diminished many of the burdens of litigating in a foreign nation. *See Hanson v. Denck'a*, 357 U.S. 235, 251 (1958); *Raffaele*, 707 F.2d at 398. Important Mexican witnesses, such as the Tijuana air traffic controllers, are located just across the border and are readily accessible via modern transportation and communication links. Litigating the instant case in San Diego is far less burdensome to the defendant than much of the interstate litigation routinely pursued in the United States. Indeed, the burden on Mexico to defend in San Diego is as small as any foreign defendant may be expected to bear. *Compare Hedrick v. Daiko Shoji Co., Ltd., Asaka*, 715 F.2d 1355, 1359 (9th Cir. 1983); *Raffaele*, 707 F.2d at 398; *I.N.A.*, 649 F.2d at 1271-72.

C. Conflict with Mexico's Sovereignty.

Mexico argues that its sovereignty raises a barrier to the reasonableness of jurisdiction. As was recognized in

I.N.A., the reasonableness of jurisdiction depends to some extent on the potential affront to the sovereignty of defendant's state. *I.N.A.*, 649 F.2d at 1272. While a defendant's sovereignty may weigh against allowing jurisdiction, that effect is minimal here. By denying immunity to foreign states defending certain claims, the FSIA reflects the modern realities of the interdependence of nations. Because personal jurisdiction turns on a determination of immunity, the FSIA represents Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it. Thus, while we are respectful of Mexico's sovereignty, we find that in the present case it does not weigh heavily against the reasonableness of jurisdiction.

D. Interests of Forum State.

California has strong interests in protecting its residents from injury and in furnishing a forum where their injuries may be remedied. *Raffaele*, 707 F.2d at 398. It has a special interest in exercising jurisdiction over those who have committed tortious acts within its boundaries. By subjecting the tortfeasor to liability for damages which are the proximate result of the tort, California acts to deter wrongful conduct affecting those within the state. *Data Disc*, 557 F.2d at 1288.

In addition, California also has an interest in ensuring that its citizens are fully compensated for their injuries. Such an interest is important both to ensure that injured individuals recover for their losses and to protect the state's economic resources from unnecessary expenditures. Finally, the forum state's interest in protecting the

welfare of its minor residents is unquestionably important. *Kulko v. California Superior Court,* 436 U.S. 84, 98 (1978).

E. Most Efficient Resolution.

District court in San Diego would be the most efficient judicial forum. A court sitting in the district where the injury occurred and where the evidence is located ordinarily will be the most efficient forum. *Raffaele,* 707 F.2d at 399. As discussed above, San Diego will most likely be the richest source of physical evidence, witnesses and documents.

The district court is required to apply California's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). If Mexican law should apply, that would admittedly have a negative effect on the efficiency of proceeding in the United States. *I.N.A.,* 649 F.2d at 1273. However, we cannot tell from the briefs or record whether a true conflict of law exists. Mexico has not shown how its law conflicts with relevant California law or why its law should be applied. In any event, we are confident that a court in California can be trusted to apply properly the law of a foreign state. Thus, choice of law considerations are not a major impediment to the efficient resolution of this dispute.

F. Convenient and Effective Relief for Plaintiffs.

Undoubtedly, a California court affords appellants the most convenient and effective site for judicial relief. Not only is important evidence present in the United States, but concerns for appellants' personal comfort and convenience argue in favor of a United States forum. As this court observed in *Raffaele,* "Individual claimants 'would be at a severe disadvtange if they were forced to

follow the . . . [defendant] to a distant state in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.'" *Raffaele,* 707 F.2d at 399 (quoting *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1957)). Access to a California court is important to appellants for obtaining relief.

Finally, appellants' likelihood of enforcing a judgment against Mexico also bears on the effectiveness of a California court as a forum for resolving the dispute. *I.N.A.,* 649 F.2d at 1273. Mexico is not immune to jurisdiction and thus enforcement of a judgment is not barred. Mexico has not shown how a judgment against it is unenforceable and thus we cannot conclude that such enforcement is so unlikely as to weigh against the reasonableness of jurisdiction.

G. Availability of an Alternate Forum.

Appellants recognize that Mexico affords an alternative forum but argue that it is, for practical purposes, unavailable. While the practicality of the alternative forum must be considered, *see Hedrick,* 715 F.2d at 1359; *Raffaele,* 707 F.2d at 399, appellants must carry the burden of proving the unavailability of an alternative forum. *I.N.A.,* 649 F.2d at 1273. Appellants allude to a severe maximum limit on wrongful death recoveries, *see Hurtado v. Superior Court,* 11 Cal.3d 574, 578-79, 114 Cal.Rptr. 106, 108 (1974), but offer no proof of applicable Mexican law to substantiate their allegation. Because appellants fail to carry their burden of proof, we cannot conclude that they are left without an alternative forum.

After considering all the relevant factors, we conclude that, on balance, it would be reasonable for a California court to exercise jurisdiction over Mexico and thus, personal jurisdiction is consistent with due process requirements.

REVERSED AND REMANDED.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

CHAPTER 97.

JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Section

1602. Findings and declaration of purpose

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§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial ac-

tivities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Oct. 21, 1976, P.L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title [28 USC § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as definied in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [28 USCS § 1332(c)(d)], nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial

transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Oct. 21, 1976, P.L. 94-583, § 4(a), 190 Stat. 2892.)

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607].

(Added Oct. 21, 1976, P.L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a com-

mercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omissions of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

Provided, That—

(1) Notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interests.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 USCS § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letterrogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed

and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 USCS §§ 1610, 1611].

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2895.)

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter [28 USCS

§ 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1602], if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution,

or from execution upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1062]), if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter [28 USCS § 1605 (a)(2), (3), (5), (b)], regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [28 USCS § 1608(e)].

(d) The property of a foreign state, as defined in section 1603(a) of this chapter [28 USCS § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(Added Oct. 21, 1976, P. L. 94-593, § 4(a), Stat. 2896.)

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exceptions, and immunities provided by the International Organizations Immunities Act [22 USCS §§ 288 et seq.] shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of a foreign state shall be immune from attachment and from execution if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver, or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2897.)

TIJUANA APPROACH CONTROL AND MIRAMAR RATCF

EFFECTIVE APR 1 1979

SUBJECT: COORDINATION PROCEDURES AND AIRSPACE UTILIZATION

1—PURPOSE: This Letter of Agreement describes the procedures of air traffic coordination and the utilization of the airspace along the Mexico-United States Border between Tijuana Approach Control and Miramar RATCF, and is supplementary to procedures contained in applicable ICAO documents and other appropriate air traffic control handbooks.

2—CANCELLATION. This agreement cancels instructive "Coordination Procedures between Tijuana Tower and Miramar APP San Diego)" dated July 31, 1971.

3—DISTRIBUTION. Tijuana APP, Miramar RATCF; Subdirector Technico of Navigation Services SENEAM, Regional Manager Mazatlan, AWE-540, and ASW-1.

4—BORDER AIRSPACE UTILIZATION.

a) *Airspace Designation.*—The Miramar RATCF airspace that may be utilized by Tijuana Approach is identified as zone A and zone B (See Annex 1).

b) *Airspace Utilization*—In order to utilize the airspace designated as zone A and zone B:

(1) Tijuana Approach shall coordinate in advance with Miramar RATCF, on each individual flight.

(2) The following meteorological conditions shall exist: 600 feet ceiling and/or ? N.M. visibility or less, down to the published minimums.

c) *Coordination.*

(1) Tijuana APP shall advise each aircraft of the Transponder Code issued by Miramar RATCF

and shall instruct them to activate it prior to crossing the border.

(2) Aircrafts inbound to the Tijuana airport to make an ILS approach to runway 09, using airspace designated as zone A and zone B, shall be level at 2,500 MSL and established on the 12-DME ARC of the TNA/VOR before entering such airspace.

(3) Use of zone A and zone B by TIJ/APP shall be terminated when the aircraft has passed the middle marker. When Miramar RATCF advises that it is necessary, the use of zone A shall be terminated when the aircraft has passed the final approach fix inbound to the airport. Miramar RATCF shall be advised when the use of zone A and B has terminated.

(4) Miramar RATCF shall advise Tijuana APP of instruction necessary to assist an aircraft from deviating from the ILS approach procedure when zone A and/or zone B is being used. Tijuana APP shall relay these instructions to the aircraft.

(5) The above procedures shall be used only when adequate direct oral two-way communications exist between the Tijuana and APP and Miramar RATCF.

5—PROCEDURES.

a) *Clearances.*

(1) Tijuana APP shall obtain clearance from Miramar RATCF for all aircraft, on IFR flight, that request to depart the Tijuana APP airspace and will enter the Miramar RATCF airspace.

(3) Miramar RATCF:

(a) Shall provide, as soon as they receive the proposed flight plans, flight data information of all IFR aircraft that depart Mira-

mar RATCF airspace and will enter Tijuana APP airspace.

(b) Shall obtain clearance from Tijuana APP for all IFR aircraft that depart the Miramar RATCF airspace and will enter Tijuana APP airspace.

b) *Departures.*

(1) Tijuana Approach Control:

(a) Shall assign all IFR aircraft, that depart the Tijuana APP airspace, to enter U.S.A. via Miramar RATCF airspace, the departture procedure indicated in ANNEX 2.

(b) Shall obtain a departure release from Miramar RATCF for all IFR aircraft that enter U.S.A. via Miramar RATCF airspace.

(2) Miramar RATCF:

(a) Shall obtain a departure clearance from Tijauana APP for all IFR aircraft that depart the Miramar RATCF airspace and will enter the Tijuana APP airspace.

(b) After receiving the clearance from Tijuana APP, shall give the departure time on IFR aircraft to TIJ/APP as soon as possible after take-off.

c) *En route:*

(1) Tijuana APP:

(a) Shall forward an arrival estimate to Miramar RATCF on all IFR aircraft that traverse Tijuana APP airspace and will next enter the Miramar RATCF airspace. These estimates shall be passed at least (5) minutes prior to the estimated time of arrival over the Tijuana VOR and shall include the following:

1. Aircraft identification.
2. Aircraft type and equipment.
3. Estimated time of arrival over the Tijuana VOR.
4. Assigned altitude.
5. Other pertinent information.

(b) Unless otherwise coordinated, shall route all IFR aircraft via TNA VOR direct mission Bay VORTAC, assigning altitudes of 8,000 feet MSL or above, up to and including 15,000 feet MSL.

(c) Unless otherwise coordinated, shall release control for vectors east of Tijuana VOR for all these aircrafts upon transfer of communications.

(2) Miramar RATCF:

(a) Shall forward an arrival estimate to Tijuana APP on all IFR aircraft from Miramar RATCF airspace that will enter Mexican airspace via Tijuana APP area. These estimates will be passed at least (10) minutes prior to the estimated time of arrival over the Tijuana VOR, and shall include:

1. Aircraft identification.
2. Aircraft type.
3. Estimated time of arrival over the Tijuana VOR.
4. Assigned altitude.
5. Other pertinent information.

(b) Unless otherwise coordinated, route all aircraft via Mission Bay VORTAC direct Tijuana VOR, at or above 6,000 feet MSL up to and including 18,000 ft. MSL.

(c) Upon receipt of an arrival estimate, issue the following:

1. Transponder Code.

2. Communication frequency.

(d) As soon as possible, advise Tijuana APP when IFR flights entering Miramar RATCF airspace from Tijuana APP airspace are clear of the border to the north.

d) *Separation.* ICAO 15 minute longitudal separation at the same altitude shall be applied to all IFR aircraft entering or departing Mexican airspace, unless special separation is specifically requested by Tijuana APP or Miramar RATCF.

e) *Tijuana Terminal Area.* When the weather at Tijuana airport is less than VFR minima or when weather conditions exist that require an arrival or departure to operate on IFR conditions, Tijuana shall forward the following:

(1) Arrivals.

(a) An expected approach time, if delays will occur for aircrafts approaching Tijuana airport for landing from Miramar RATCF airspace.

(b) An estimated time of arrival over the Tijuana VOR for those flights originating in Mexico. This estimate shall be passed at least (5) minutes prior to the estimated time of arrival.

(c) A landing assured report on all these aircrafts.

(2) Departures.

(a) Proposed departure time.

(b) Direction of flight.

(c) Actual departure time.

6—SPECIAL PROCEDURES.

a) Miramar RATCF shall immediately notify Tijuana APP whenver the Mission Bay VORTAC fails.

b) Tijuana APP shall immediately notify Miramar RATCF whenever the Tijuana VOR fails.

c) Each facility shall notify the other at least 30 minutes in advance of a scheduled maintenance shutdown of the navaids listed in a. and b. above.

/s/ Jerry D. Luce
Chief Miramar RATCF
Federal Aviation Administration

/s/ Paul J. Baker
Acting Director, Southwest Region
Federal Aviation Administration

/s/ Fernando Molinar Prieto
Sub-Director, Navigational Services
SENEAM

/s/ Armando Camarillo F.
Chief, Tijuana Control Tower

/s/ Jaime Zapian Munoz
Chief, Air Traffic Service,
SENEAM

/s/ Pascal Escarceca Valez
Director, Mazatlan Area, SENEAM

ANNEX 2—Tijuana Approach Control and Miramar RATCF Letter of Agreement

Effective: April 1, 1979

1. Clearance for aircraft requesting to operate IFR within Miramar RATCF airspace.

(a) *Tijuana Departure:* "Cleared to *(destination airport)* via the Tijuana 250 radial, thence via the the Mission Bay 150 radial Mission Bay VORTAC

(then, as cleared). Maintain four thousand. San Diego Departure Control frequency will be *(frequency)*, Squawk *(Code).*''

APPROVED /s/ (Illegible) FIFO
DATE April 14, 1978
SIGNED /s/ Jerry D. Luce
Facility Chief
Miramar RATCF

File	Date Location	Aircraft Data	Injuries F S M/N	Flight Purpose	Pilot Data
E-0019	10/27/79 NR.SAN YSIDRO,CA Time 2346	Beech 200 XC-PGR Damage—Destroyed	DR- 2 0 0 PX- 8 0 0	Miscellaneous Unknown/Not Reported	Airline Transport, Age 34, 6425 Total Hours, 90 in Type, Instrument Rated.

Name of Airport—General Rodrigues

Departure Point
Monterrey, Mexico

Intended Destination
San Ysidro, CA

Type of Accident
Collision with ground/water: Controlled

Phase of Operation
Landing: Final Approach

Probable Cause(s)
Pilot in Command—Improper IFR Operation

Factor(s)
Weather—Low Ceiling
Weather—Fog
Airports/Airways/Facilities—Airport Facilities: Instrument Landing System

Weather Briefing—Unknown/Not Reported

Weather Forecast—Unknown/Not Reported

Sky Condition
Partial Obscuration

Ceiling At Accident Site
0

Visibility at Accident Site
½ Mile or Less

Precipitation at Accident Site
None

Obstructions to Vision at Accident Site
Fog

Temperature—F
58

Wind Velocity—Knots
Calm

Type of Weather Conditions
IFR

Type of Flight Plan
IFR

Fire After Impact

Remarks—Hit Pwr Pole 14Ft. AGL Aprx 2Mi from Apch End of Rwy. Localizer Inop, using VOR/DME.